Supreme Court, U. S.
F I L E D
MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 74-1500

FRED McCORD and
KERRY LUZADER, Petitioners,

V.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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The Petitioners, Fred McCord and Kerry Luzader, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 24, 1975.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 24, 1975. A timely petition for rehearing en banc was denied on April 24, 1975. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Petitioners were deprived of their Constitutional right to a fair trial, secured to them by the Fifth Amendment of the Constitution of the United States, by the government's failure to make good faith discovery disclosures and the subsequent supression of material evidence favorable to the Petitioners.

2. Whether Petitioners were deprived of due process of law, secured to them by the Fifth Amendment of the Constitution of the United States, by the government's failure

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to record the grand jury testimony of the government's witness and by the trial court's refusal to strike the trial testimony of the government's witness pursuant to the Jencks Act.

3. Whether Petitioners Fred McCord and Kerry Luzader were erroneously convicted, and said convictions erroneously affirmed, in violation of the Petitioners' rights, secured to them under the Fifth Amendment of the Constitution of the United States, when testimony concerning other unalleged criminal activity was erroneously admitted into evidence, over the Defendants' objections, in the government's case in chief.

4. Were the Petitioners Fred McCord and Kerry Luzader erroneously convicted, and said convictions erroneously affirmed, in violation of the Petitioners' rights

secured to them by the Fifth Amendment of the Constitution of the United States, when, over the Defendants' objections the trial court erroneously instructed the jury as to the proper consideration and use of *modus operandi* evidence, erroneously instructed the jury on the defense of entrapment when that issue had not been presented in the case, and this was held to be harmless error.

STATEMENT OF THE CASE

Petitioners, Fred McCord and Kerry Luzader were indicted by the Grand Jury for the Southern District of Indiana on the 29th day of September, 1972. Count I of the indictment charged that, on the 27th day of August, McCord unlawfully distributed 7.6 grams of cocaine in violation of 21 U.S.C. §841(a)(1). McCord was also charged in Count IV of the indictment with the knowing and intentional use of a public telephone to facilitate the unlawful distribution of cocaine in violation of 21 U.S.C. §843(b). Counts II and III of the indictment charged that Luzader unlawfully distributed approximately 34 grams of cocaine on or about September 5, 1972, and that, on or about August 27, 1972, he knowingly and intentionally used a public telephone to facilitate the unlawful

distribution of cocaine by McCord. Count V of the indictment, charging conspiracy to unlawfully distribute cocaine in violation of 21 U.S.C. §846, was dismissed on defendants' motion prior to trial.

After trial by jury both Petitioners were convicted and sentenced on all counts. These convictions were subsequently affirmed by the United States Court of Appeals for the Seventh Circuit. (See Appendix A.)

FACTS RELEVANT TO QUESTION #1

On the 7th day of March, 1973, the trial court issued its Discovery Order in this cause, and on the 23rd day of April, a hearing was held upon defense's allegation that the Government had failed to comply with this order. At the conclusion of the hearing, the inquiry had focused upon two items of discovery, the past criminal

record of the Government's informant, Paige, and Paige's relationship with various police agencies.

The trial court ordered the Government to provide a current and complete version of Paige's criminal record, and to make relevant members of police agencies available to the defense, in order to define Paige's relationship with those agencies.

At the conclusion of the rebuttal evidence presented by the government, defense moved for a Judgment of Acquittal or in the alternative, for a mistrial, based upon the failure to fully comply with these orders. The evidence presented in support of the motion, heard outside the presence of the jury, established that as to Paige's criminal record, the government had provided the defense with Exhibit E, F.B.I. "rap sheet". Paige testified that

his record had been cleaned up, and in response to the question, "Is it your position that that document accurately reflects your prior criminal record?" Paige responded, "No, sir." Paige acknowledged that there were relevant matters which had not been communicated to defense counsel and were not heard by the jury.

As the second discovery matter in response to the trial court's order, defense counsel met with Officer Murphy of the Anderson Police Department, on the 23rd day of April, 1973. Officer Murphy admitted that when he was asked, by defense counsel, about his knowledge of uncharged criminal activity of Paige, he had represented that he possessed no such knowledge, but that on the following Wednesday he told defense counsel of hearsay information concerning Paige's sale of acid and marijuana at Delco Remy.

Paige testified that when Murphy arrested him, Murphy told him of his knowledge of Paige's illegal activities, and that the information included things other than selling drugs at Delco Remy. Officer Murphy took the stand and testified that he simply did not remember. At the conclusion of this evidence, defense counsel's motion was overruled.

FACTS RELEVANT TO QUESTION #2

During the course of the trial, at the conclusion of the direct examination of Agent Standifer, defense counsel moved for the production of Standifer's Grand Jury testimony, for the purpose of cross-examination. The court proceeded into a hearing, and the government called Assistant United States District Attorney Scott Miller as its witness. Miller testified that he conducted the Grand Jury which returned the Indictment, and that

Standifer's testimony was not recorded or preserved. The trial court, in cross-examination of Mr. Miller, refused to allow defense counsel to inquire of Mr. Miller as to his duties in relation to this Grand Jury, the customary procedure concerning Grand Jury records, in fact, the only question which the trial court would allow was as to whether the proceedings were recorded. Mr. Miller testified that the proceedings were not recorded, and the trial court would not allow defense counsel to inquire as to why no record was made.

The trial court then called upon the defense to present any evidence which they possessed to establish that a record did, in fact, exist. At this juncture, defense counsel moved to strike the testimony of Agent Standifer.

At the conclusion of the hearing, the court ruled as follows:

> THE COURT: And the Court's ruling is that the evidence discloses that there is no recording of this witness's testimony before the Grand Jury, and the Government has purged itself of the obligation under the Jencks Act by reason of this evidence and the failure of the defendants to produce any evidence that there was such a recording. And we now have the motion, here, to strike the evidence, and that motion is overruled. <u>There is no requirement in law for the recording of testimony before the Grand Jury, that, I know of, of a witness.</u> (Emphasis added)

<u>FACTS RELEVANT TO QUESTION #3</u>

Prior to the testimony of the Government's witness, Michael Hoppes, defense, counsel moved to limit Hoppes' testimony to the facts alleged in the Indictment. During the argument which followed the government suggested that Hoppes' testimony

was offered to show: 1) Identity, 2) Guilty Knowledge, 3) General *modus operandi*, 4) Common scheme or plan 5) to establish a prior disposition in relation to an anticipated entrapment defense. It is unclear from the record as to which of these bases the court accepted, but Hoppes was allowed to testify, over the continuing objection, to an unalleged transaction between himself, McCord and Luzader, which purportedly took place on September 8th, 1972. This purported transaction did not occur at the site of the alleged activity of the 27th day of August, and did not involve the same participants.

Subsequent to Hoppes' testimony, both defendants moved for a mistrial on the basis that the probative value of Hoppes' testimony was so limited, and so highly prejudicial, as to have denied the defendants a fair trial. In support of this

motion, the Court was asked to specifically delineate the basis for the testimony's admissability. The Court's response, in overruling the motion for a mistrial, seems to indicate the ruling was based upon the fact that this was a narcotics case, and that this was evidence of prior disposition, necessary to preclude a finding on entrapment. The United States Court of Appeals for the Seventh Circuit held that this evidence was not admissable as *modus operandi*.

FACTS RELEVANT TO QUESTION #4

The petitioners objected to the reading of the court's jury instruction #20 and #25, and on appeal the United States Court of Appeals for the Seventh Circuit held that the error in giving these instructions, if any, was harmless error.

(See Appendix B)

REASONS FOR GRANTING THE WRIT

1. This Petition presents a significant question concerning the application of the doctrine of *Napue v. State of Illinois*, 360 U.S. 264 (1959), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Moore v. Illinois*, 408 U.S. 786 (1972).

As developed in our statement of the case, the jury must have believed the testimony of Paige, a government informant, in order to have found Petitioners guilty of the crime charged. The extent to which Paige furthered his own interests by testifying and a complete recounting of Paige's uncharged illegal activities were matters which the jury should have been able to fully consider in assessing the witness's credibility. The government's non-disclosure of complete and accurate information prior to trial violates the dictates of *Brady*, *supra*, and the

resulting prejudice to Petitioners requires reversal under *Napue*, *supra*, and *Moore*, *supra*.

If in the course of the investigation and preparation of the criminal prosecution, the government comes into possession of eculpatory or otherwise favorable evidence to the accused, the Government is under an affirmative duty to disclose this material to the defense. The suppression by the government of evidence relevant and material to a criminal cause is a violation of the defendant's right to due process of law and *Brady*, *supra*, stands for the proposition that good faith or bad faith of the prosecution is not relevant.

In the case at bar, there is no question about the fact that undisclosed information on Paige's history did exist. On cross-examination at trial, Paige affirmed that the information which had been

provided to defense counsel by the District Attorney was inaccurate and stated that there were other matters, including criminal activity, which he had not revealed to defense counsel and which had not been revealed to the jury. Paige testified that his criminal record, as presented to the defense had been cleaned up and that Officer Murphy had not been candid and complete in disclosing information concerning his knowledge of Paige's uncharged criminal activities.

The Government had presented the defense with the F.B.I. "rap sheet" in response to the Court's order, but the government had a further duty to determine the accuracy and completeness of such information through interviews with Paige and Officer Murphy. That Officer Murphy, a government witness present during the entire trial,

and not the District Attorney, was in possession of such information does not excuse the non-disclosure. Justice Marshall stated in *Moore v. Illinois*, 408 U.S. 786 at 810 (1972):

> When the prosecutor consciously uses police officers as a part of the prosecutional team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose. It would be unconscionable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that bear the responsibility of producing all known and relevant evidence tending to show innocence.

This principle was first noted in *Giglio v. United States*, 405 U.S. 150 (1971), a case involving non-disclosure of an alleged promise of leniency made by an Assistant United States Attorney without the knowledge of the United States Attorney to its key witness in return for his testimony. Chief Justice Burger noted that "whether the non-disclosure was a

result of negligence or design it is the responsibility of the prosecutor."

The standards by which the prosecution's case is to be measured were set forth in *Moore v. Illinois*, 408 U.S. 786 (1972) and the Seventh Circuit's application in the case of *United States v. Ott*, 489 F.2d 876 (7th Cir. 1973) does not meet those standards. The considerations are: suppression by the prosecution after a request by the defense, the evidence's favorable character for the defense, and the materiality of the evidence. *Moore* at 794.

The facts of the case at bar, set out above, demonstrate clearly that the defense requested complete information on Paige's criminal record and uncharged illegal activities and the government was under an Order to disclose all such information to the defense.

Napue v. Illinois, 360 U.S. 264 (1959) established that due process is violated when the government allows false evidence to go uncorrected and that this was so even though the false testimony goes only to the credibility of the witness. The testimony of Paige and the discovery reports were "false" in the sense that they were incomplete and misleading. Materiality is found if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue*, at 271. *Giglio* and *Moore* reaffirmed this principle.

In an unreported decision of the Ninth Circuit, *United States v. Butler*, 16 Crim. L. Rptr. 2345, (December 18, 1974), a recent case involving reversal for suppression of impeachment material, Judge Wright further delineated the requirement of

materiality:

> The proper standard in negligent non-disclosure cases should call for a new trial whenever the non-disclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict. *Giglio's* "effect on the judgment of the jury" language seems to focus on the quality of the evidence rather than the outcome of the case.

The focus must be on the character of the evidence involving the key witness which was not disclosed and its potential impact on the factual conclusions of the trial. The government's case depended entirely on Paige's testimony, and Paige's credibility was therefore an essential factor in this case. Any inroads which the defense could have made upon impeachment of his credibility would have been favorable and material to the defense. This court's comment in *Napue* at 269 is applicable:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The Jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

The Seventh Circuit's holding in the case at bar that Petitioners were not prejudiced by the District Attorney's failure to provide accurate and complete information concerning the key witness's prior criminal activity, as directed by the trial court's Pre-trial Discovery Order, and by the failure of the District Attorney and Mr. Paige to fully disclose all such information at trial fails in its application of the principles and standards of recent cases. The opinion below erroneously

asserts that there was no prejudice since the witness, Paige, answered questions during cross-examination regarding his past criminal record, other criminal activities and promises made by the government to him in return for his cooperation. The trial record indicates that Mr. Paige verified that there were matters involving his criminal background and conduct which had not been revealed to the defense or to the jury. Reliance upon a conclusory finding of lack of prejudice, citing *United States v. Ott*, 499 R. 2d 876 (7th Cir. 1973), where the jury in this case as the determiner of credibility, could not evaluate any complete disclosure by Mr. Paige, undermines the principle of due process of law and the concommitant value of impeachment evidence which this court has delineated in *Napue*, *Brady* and *Moore*. As noted

more fully in the statement of our case, Paige testified at a hearing on a motion for mistrial that there were matters still undisclosed and he refused to disclose them. The jury was not present for this testimony. It is submitted that it was highly prejudicial to Petitioners in their ability to prepare for trial and to undertake cross-examination for the purpose of impeachment to have been provided with inaccurate and incomplete information and thus Petitioners were deprived of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

2. This Petition presents a significant federal question concerning the application of due process standards and principles with regard to defense discovery after

the 1970 amendments to the Jencks Act, 18 U.S.C. §3500, and the resulting constitutional requirement that all grand jury proceedings be of record. The decision of the United States Court of Appeals for the Seventh Circuit (Appendix A) relies upon *United States v. Aliosio*, 440 F. 2d 705 (7th Cir. 1971), a decision which did not deal with the recent amendments to the Jencks Act. In addition, the Seventh Circuit in its reasoning ignored the dictates of *Wardius v. Oregon*, 412 U.S. 470 (1973) and the *United States v. Bryant*, 439 F. 2d 642 (1971) in violation of Petitioners' right to due process of law.

18 U.S.C. Sec. 3500 (commonly referred to as the Jencks Act), prior to October 15, 1970, stated in its relevant parts . . .

> (b) after a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the

> United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use . . .

The term, "statement," as used in subsection (b) of this section in relation to any witness called by the United States, means --

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a statographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

On the 15th day of October, 1970, this section of the United States Code was amended as it relates to this appeal to include a third definition for the term "statement"

which is as follows: "(3) a statement, however taken or recorded, or transcription thereof, if any, made by said witness to a grand jury."

Under the amended provisions of the Jencks Act, if a recording and transcription had been made of the testimony presented before the Grand Jury which returned the Indictment in this case, and if any of the witnesses testified before the Grand Jury testified in the trial of this cause, the defense counsel would have been entitled to a transcript of that witness' testimony, for purposes of cross-examination. The purpose of the 1970 amendment to the Jencks Act expressly placing grand jury testimony within the definition of statements subject to discovery is to undergrid the truth-finding process of criminal trials by making any existing prior

statements made by a witness equally available to the defense and the prosecution. Petitioner contends that the Government is under a duty to preserve such testimony in the form of a transcript because the Grand Jury testimony of such witness is now discoverable at trial and that the grand jury testimony should be made available to defense counsel at the time of trial for purposes of cross-examination.

In the case of *United States v. Bryant*, 439 F. 2d 642 (1971) narcotics agents staged a full-scale investigation and as a part of that investigation, tape-recorded various transactions that served as a basis for the prosecution which resulted. Prior to trial the tape-recordings were "lost." Justice Skelly Wright, in a well-reasoned opinion, determined that the tape-recordings involved would have been

discoverable under Rule 16 of the Federal Rules of Procedure, under the Jencks Act, and possibly would also have been discoverable under the dictates of *Brady v. Maryland, supra*. After having made this judgment as to the discoverability of the tapes by the defense, the court framed the issue as "whether intentional nonpreservation by investigators -- as opposed to bad faith destruction or prosecutorial withholding of discoverable evidence amounts to illegal suppression?" In response to this issue the Second Circuit, by Justice Wright, determined

> that sanctions for nondisclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation. The burden is, of course, on the Government to make this showing. Negligent failure to comply with the required procedures

> will be no excuse . . . by requiring that discretionary authority of investigation agencies be controlled by regular procedures for preserving evidence, we intend to insure that rights recognized at one stage of the criminal process will not be undercut at another, less visible, stage. (Emphasis added)

In the case at bar, the grand jury testimony of Agent Standifer was "lost" because it was never recorded. The Assistant District Attorney testified at trial that the proceedings were not recorded or transcribed and the trial court would not allow defense counsel to inquire as to why no record was made. Impeachment of the government witness was essential to a full and fair defense of these Petitioners and was denied to them by the prosecution's decision not to record the grand jury testimony. In effect, the discovery rights at trial, which the 1970 amendments to the

Jencks Act recognized, were undercut "at another, less visible stage."

In *Wardius v. Oregon*, 412 U.S. 470 (1973) this Court unanimously held unconstitutional a state alibi-notice provision which made no provision for reciprocal discovery, and stated that the Due Process clause of the Fifth Amendment does speak to the balance of the forces between the accused and his accuser. That principle needs no extension to require a recording of grand jury testimony. Here the accuser by not recording the grand jury testimony of Agent Standifer absolutely denied to the Petitioners prior testimony which is now discoverable under the Jencks Act and was essential to their defense.

The right to due process of law as discussed in *Wardius, supra* guarantees equal availability of discoverable evidence.

The exercise of prosecutional discretion in this case with respect to the non-availability of Agent Standifer's testimony is clearly a violation of that right. The trial court erred in refusing to strike the direct testimony of the government's witness, Standifer, in compliance with the Jencks Act. The Seventh Circuit's decision failed to apply the 1970 amendments to the Jencks Act and the due process principle of *Wardius, supra*.

3. The decision below conflicts with other Courts of Appeals of other Circuits as to the admissibility of evidence of other crimes under the rubric of *modus operandi*.

The United States Court of Appeals for the Seventh Circuit simply applied the label *modus operandi* to Hoppes' testimony,

pointed to the similarities between that testimony and the alleged facts of the case at bar, ignored the factual differences, and ruled that the testimony was properly admitted.

The court did not acknowledge that *modus operandi* is a narrow exception to the general rule prohibiting such evidence, *McCormick, Evidence*, Sec. 190, (1972) *Wigmore, Treatise on Evidence* Vol. 1, Sec. 194, p. 235, nor did it engage in the balancing test required in *United States v. Lawrence* 480 F. 2d 688 (1973). That Court did not evaluate the evidence to determine whether it was "plain, clear, and conclusive that the defendant did in fact commit the other crimes" *United States v. Broadway*, 477 F. 2d 991 (1973).

Hoppes' testimony as to a crime, subsequent to the offenses included in the

indictment, was wholly uncorroborated by either physical evidence or the testimony of others. At the time he testified, Hoppes was a convicted felon awaiting his own sentencing. This testimony had little probative value, was highly prejudicial, and should not have been admitted into evidence and considered by the jury. Its admission prejudiced the entire proceeding and denied the Petitioners' their rights under the Fifth Amendment of the Constitution of the United States.

4. Rulings of the Court below upon the Petitioners' objections to the trial court's giving of jury instructions #20 and #25, are inconsistent with other cases from the same circuit, and contravene existing standards of this court concerning harmless error.

Jury instruction #25 is a classic entrapment instruction. The court below agreed that since the Petitioners had not raised entrapment as an issue, their objection should have been sustained and the instruction should not have been read to the jury. However, the reviewing court held that any error involved was harmless.

In order to evaluate this holding one must read instruction #25 in its' entirety. (See Appendix B) Petitioners' position at trial was that they did not commit the alleged offenses, and this instruction tells the jury that even though they committed the acts, there are still circumstances under which they should be found not guilty. The instruction is only intelligible if one assumes that the speaker, the trial court judge, believed that the Petitioners committed the

alleged acts. The trust of this instruction is, if the Petitioners committed the acts under circumstances A they are guilty. If, on the other hand, they committed the acts under circumstances B, they are not guilty. It is necessarily assumed in this instruction that they in fact committed the alleged acts. Given that the defendants, by cross-examination asserted their denial of the acts, this instruction was tantamount to a directed verdict of guilty. It does not leave open to the jury the question as to whether it was proven, beyond a reasonable doubt, that the Petitioners committed the alleged act, for that is assumed. The jury must only consider the surrounding circumstances. Given that the Petitioners did not raise entrapment, this instruction was fatal.

In *Chapman v. California* 386 U.S. 18 (1967), this court defined harmless error as error which is harmless beyond a reasonable doubt. The burden is upon the beneficiary of the error, in this case the government, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Under this standard it is obvious that the giving of instruction #25 constitutes reversible error.

Jury instruction #20 directs the jury as to the circumstances under which, and the purposes for which it may consider the testimony of Hoppes. This instruction, assuming arguendo that Hoppes' testimony was admissable as *modus operandi*, is a misstatement of law as to the proper use of the testimony. As evidence of *modus operandi*, it is proof of one crime which tends

to corroborate the other, *United States v. Jones* 438 F. 2d 461. As such the limiting instruction which advises the jury that it may consider the testimony only as to intent is a clear misstatement of law.

Additionally, this evidence, under present standards of the court below, cannot be used to find intent. In *United States v. Fearns* 501 F. 2d 486 (1974), the court below held that evidence of similar crimes can only be admitted to show intent if intent is an issue. In that case the defendant was convicted of possession of treasury checks stolen from the mail, and forging and aiding and abetting forging the checks to receive money from the United States.

The indictment alleged the unlawful possession of four checks and at trial a co-defendant was allowed to testify concerning

25 or 30 other checks. The court observed

> We have some doubt about the admissability of the evidence to show intent, for the acts with which Fearns was charged were hardly equivocal . . . It is hardly conceivable that, if those acts were done, they were done with innocent intent. There are decisions of this court indicating that under these circumstances it is error to admit evidence of other similar acts.

(Citations omitted). It is equally inconceivable that if the Petitioners in this cause committed the alleged acts, that they did so with innocent intent.

Instruction #20 suffers from compound errors. As an instruction on the use of *modus operandi* evidence it is legally incorrect, and as it instructs the jury to use Hoppes' testimony only in relation to the Petitioners' intent, it causes the jury to consider this evidence solely for a purpose for which it is not admissible.

To give such a completely flawed instruction could only have confused the jury and prejudiced the Petitioners. Under the above-cited standards, to have given this instruction constitutes reversible error.

CONCLUSION

For all of the above-stated reasons, the Petitioners pray that this court grant a Writ of Certiorari, allow the questions to be fully briefed, and upon proper showing to reverse and remand this cause for a new trial.

Respectfully submitted,

David J. Colman

David J. Colman
Counsel for Petitioners
Fred McCord and
Kerry Luzader

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 73-1879 & No. 73-1880

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRED MCCORD and KERRY LUZADER,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana — No. 72 CR 206
Cale J. Holder, *Judge.*

ARGUED APRIL 4, 1974 — DECIDED JANUARY 24, 1975

Before PELL and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Defendants McCord and Luzader were charged in a five count indictment with various offenses involving the unlawful distribution of cocaine. Count I of the indictment charged that, on or about August 27, 1972, McCord unlawfully distributed approximately 7.6 grams of cocaine in violation of 21 U.S.C. § 841(a)(1). McCord was also charged in Count IV of the indictment with the knowing and intentional use of a public telephone to facilitate the unlawful distribution of cocaine, in violation of 21 U.S.C. § 843(b). Counts II and III of the indictment charged that Luzader unlawfully distributed approximately 34 grams of cocaine

* Senior Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

on or about September 5, 1972, and that, on or about August 27, 1972, he knowingly and intentionally used a public telephone to facilitate the unlawful distribution of cocaine by defendant McCord. Count V of the indictment, charging conspiracy to unlawfully distribute cocaine, was dismissed on defendants' motion prior to trial.

Following a jury trial, defendants were found guilty on all counts. We affirm.

The evidence disclosed that Agents Jovonovich and Standifer of the Federal Bureau of Narcotics, in cooperation with officials of the Anderson, Indiana Police Department arranged with a cooperating individual, William Paige, to surveil a planned purchase of cocaine at Paige's home. Agent Standifer arrived at Paige's home on August 27, 1972 to pose as the purchaser of the cocaine. In Standifer's presence, Paige received a telephone call from an individual identifying himself as Luzader. The caller inquired as to how much cocaine Paige wanted to purchase. In response to Paige's statement that he wanted one-fourth of an ounce, the caller stated that they "would be out". Immediately thereafter, McCord called Paige and confirmed the planned transaction.

Within a short time, two persons arrived in an automobile at Paige's home. Paige went outside and returned with a small clear bag containing what was later identified as 7.6 grams of cocaine. He explained to Standifer that the seller, who Paige identified at trial as McCord, would not meet with Standifer, but would sell to Paige. Standifer gave Paige $250.00 in marked currency and Paige again went outside to complete the transaction.

Officer Murphy of the Anderson Police Department, who had been surveilling the transaction with Agent Jovonovich, testified that during the transaction the dome light of the automobile was on long enough for him to make a positive identification of McCord. The license number of the automobile was later traced and was shown to be registered to McCord.

Subsequently, Paige arranged to make another purchase of cocaine and, after a discussion with Agent Standifer, Paige called Luzader's telephone number. Luzader returned the call and Paige informed him that he was interested in purchasing one ounce of cocaine. On September 6, 1972, an individual driving a Volkswagon arrived at Paige's home. Paige gave the occupant of the car $900.00 in return for one ounce of cocaine and, as the money was being counted, Agents Orville Kleppinger and Standifer observed the driver through binoculars from a second story window of Paige's home. Both agents later identified the occupant of the car as Luzader. The license number of the Volkswagon was later traced and found to be registered to Luzader.

The government's final witness was Michael Hoppes. The defendants moved to prohibit any testimony by Hoppes which was not related to the transactions alleged in the indictment. The motion was denied and Hoppes was permitted to testify that, early in September of 1972, he had contacted Fred McCord to arrange a purchase of cocaine. McCord indicated that the cocaine would cost $900.00 per ounce. On September 8, 1972, Hoppes made arrangements by telephone to complete the transaction. He later approached Fred McCord in a supermarket parking lot in Anderson, Indiana, and was told by McCord that Luzader had the cocaine in a nearby filling station parking lot. Hoppes approached Luzader, who was seated in his car, and was given one ounce of cocaine. Subsequently, Hoppes unwittingly sold the cocaine to undercover Agent Standifer, and then paid McCord the $900.00 purchase price.

On appeal, defendant McCord asserts five grounds for reversal:

(1) That the government failed to make good faith discovery disclosures, in violation of the district court's pretrial order;

(2) That the trial court erred in overruling defendant's motion to strike the testimony of Agent Standifer.

(3) That the court erred in admitting, over objection, the "other offenses" testimony of Michael Hoppes.

(4) That the district court erred in overruling McCord's motion for a severance at the conclusion of the government's case-in-chief.

(5) That the court erred in giving certain jury instructions over defendants' objection.

Of the foregoing, Luzader specifically asserts the third and fifth issues raised by defendant McCord. The remaining three issues are raised only by the latter defendant.

McCord argues that, after some difficulty in obtaining compliance by the government with pretrial discovery orders, the district judge directed the government to provide defense counsel with a complete and current version of the criminal record of the government's principal witness, informant Paige. The court also ordered the government to make relevant members of the Anderson, Indiana Police Department available to the defense in order to fully define Paige's working relationship with the police. During the trial, defendant's cross examination of Paige established that the government's report setting forth Paige's prior criminal record, which had been tendered to the defense by the government, did not completely and accurately reflect the witnesses' criminal record. Cross examination of Paige further established that Officer Murphy of the Anderson, Indiana Police Department had demonstrated, in his discussions with Paige, that Murphy possessed knowledge of certain criminal activities involving Paige, beyond those which Murphy had disclosed to defense counsel after the officer had been made available to McCord's attorneys for questioning pursuant to the district court's aforementioned pretrial order. McCord argues that the government's failure to make a good faith and thorough disclosure of Paige's criminal background deprived the defendant of due process of law, particularly since much of the government's case rested upon the testimony of this witness.

Once the aforementioned facts had been established through cross examination, a thorough examination of Paige was allowed by the district court regarding his prior criminal activities, including criminal misconduct for which he had not yet been charged. A review of the record indicates that the jury was thoroughly apprised of the full extent of Paige's prior criminal activities, as well as his cooperation with the Anderson Police Department. In addition, Officer Murphy was called by the government as a rebuttal witness and testified that, at the time he spoke with defense attorneys, he had not remembered Paige's involvement in uncharged illegal activities, and that he had not intentionally withheld that information.

The record before us does not demonstrate that the government intentionally misstated facts regarding Paige's prior criminal record. Nor does the record show that Officer Murphy intentionally withheld such information. And, since the witness thoroughly and candidly answered questions during cross examination regarding his past criminal record, other criminal activities, and any promises made by the government to him in return for his cooperation, it seems clear that defendant was not prejudiced by the inaccurate and incomplete information which he had received in this regard prior to trial. If the government had intentionally failed to accurately disclose such relevant information after disclosure had been directed by the trial court, defendant's failure to demonstrate prejudice would not necessarily be controlling, and reversal of the conviction might well be warranted. Moreover, where the government's failure to satisfactorily comply with such an order is the product of negligence, rather than bad faith, reversal might nevertheless be required where prejudice is shown. Along these lines, Judge Stevens' excellent opinion in *United States v. Ott*, 489 F.2d 872 (7th Cir. 1973) should be required reading. But here, McCord has demonstrated neither bad faith nor prejudice, thus distinguishing the facts of this case from those of *Ott* and requiring our rejection of McCord's claim that he was denied due process of law.

McCord next contends that testimony of Agent Standifer should have been stricken by the trial court because the government failed to produce a transcript of Standifer's testimony before the grand jury upon motion by McCord pursuant to 18 U.S.C. § 3500. In response to McCord's motion, the government represented that the grand jury testimony of Agent Standifer had not been transcribed. As did the defendant in *United States v. Aloisio*, 440 F.2d 705 (7th Cir. 1971), McCord contends that the government should be required to preserve the testimony of grand jury witnesses "in order to implement the right of a defendant to access to a witness' grand jury testimony on subjects about which he subsequently testifies at trial." 440 F.2d at 708.

Rule 6(d) of the Federal Rules of Criminal Procedure presently permits, but does not require, the stenographic transcription of grand jury testimony. Although some district courts (e.g., the Northern District of Illinois) have adopted local rules requiring that grand jury testimony be transcribed, the Federal Rules do not presently demand that this procedure be followed. As this court stated in *Aloisio*, supra,:

> "This approach, though justifiably criticized on several grounds, has nevertheless been uniformly observed by other Circuits. . . . While we agree that the preservation of grand jury testimony is the wise practice, we are presently unwilling to bind the various district courts of this Circuit to such a practice. Rather, we will rely upon the individual district courts to exercise their local rule-making powers in this area pending any amendment to Rule 6(e) of the Federal Rules of Criminal Procedure". 440 F.2d at 708.

Defendant's contention that his conviction should be reversed on this ground is, therefore, rejected.

McCord further contends that the denial of his motion for severance, made at the close of the government's case-in-chief pursuant to Rule 14 of the Federal Rules of Criminal Procedure, constituted reversible error. He argues that it was manifestly unjust to compel him to

stand trial as Luzader's co-defendant because of the extensive evidence introduced solely against Luzader concerning the September 6 transaction.

The disposition of a Rule 14 motion claiming prejudicial joinder of offenses or of defendants is a matter soundly within the discretion of the trial judge. Accordingly, the denial of such a motion is subject to reversal on appeal "only if abuse of discretion is shown". *United States v. Pacente*, 503 F.2d 543 (7th Cir. 1974). Under the circumstances of the instant case, the denial of defendant McCord's motion was well within the district judge's discretion. Each of the defendants participated to some extent in the August 27 transaction which formed the basis for three of the four counts. Further, the August 27 and September 6 transactions, as well as the transaction involving Michael Hoppes (discussed *infra*), were executed in a markedly similar manner. In addition, the district judge had earlier cautioned the jury to consider evidence regarding the September 6 transaction only as it applied to Luzader. Under these circumstances, the denial of McCord's motion was not error.

Both defendants complain that it was improper to permit Michael Hoppes to testify regarding his purchase of one ounce of cocaine from McCord and Luzader in early September, 1972, arguing that the admission of evidence of criminal conduct other than that alleged in the indictment constituted prejudicial error. At trial, the government offered several arguments to justify the admission of Hoppes' testimony, one of which was that this evidence could be offered *in anticipation* of an entrapment defense to show defendants' predisposition to commit the offenses with which they were charged.

The record indicates that although the defendants had considered the possibility of arguing entrapment, no positive effort was made to rely upon this defense prior to the close of the government's case-in-chief, either during defendant's opening arguments or through cross examination of government witnesses. Since the rule in this Circuit requires the defendant to admit involvement

in the acts alleged in the indictment in order to raise entrapment as a defense. *United States v. Roviaro*, 379 F.2d at 911, 914 (7th Cir. 1967), evidence of other criminal conduct to show predisposition should not be admitted until the defense concedes involvement in the acts alleged, or at least demonstrates clearly that the entrapment defense will ultimately be raised. No such clear indication was made in the instant case prior to Hoppes' testimony and, as will be discussed, *infra*, defendants ultimately asserted without equivocation that they would not argue entrapment.

Hoppes testimony, however, was admissible to show *modus operandi*, since the Hoppes' transaction, occuring close in time to those alleged in the indictment, bore a remarkably strong resemblance to the pattern of conduct with which defendants were charged. *United States v. Hampton*, 457 F.2d 299, 302 (7th Cir. 1972). The type of narcotics sold to Hoppes, cocaine, was the same as that sold on occasions alleged in the indictment. It was sold from an automobile for $900.00 per ounce after the transaction had been arranged by telephone. Finally, the Hoppes transaction occurred within a week to ten days of the offenses charged in the indictment. As this Court stated in *United States v. Jones*, 438 F.2d 461, 466, wherein the admission of such evidence was upheld,

> "[t]he June 5th sale of cocaine was a similar offense, proximate in time, involved the same three individuals . . . and an almost identical *modus operandi* was employed. It bore a singular strong resemblance to the pattern of the offense charged. And, it was so related to and connected with the crime charged that the proof of the one tended to corroborate the proof of the other."

Accordingly, evidence of the Hoppes transaction was properly admitted.

Finally, both defendants assert that Instructions No. 20 and No. 25 should not have been given by the trial court. Instruction No. 20 advises the jury regarding the manner and extent to which evidence of the Hoppes transaction may be considered. Essentially, the jurors

were instructed that evidence of the Hoppes transaction could not be considered until the jury had determined beyond a reasonable doubt that defendants had performed the acts alleged in the indictment. The Instruction further advised the jury that, if and when such a determination were made, evidence of the Hoppes transaction could then be considered as indicative of "an independent voluntary disposition" to commit the acts charged, or to "determine the state of mind or intent with which" the defendants performed the acts charged.

We have reviewed Instruction No. 20 in its entirety, and find it neither an incorrect statement of law nor confusing. Accordingly, we reject defendants' contention with respect to the giving of this instruction.

Instruction No. 25 advised the jury regarding the law of entrapment. As defendant McCord concedes, the Instruction is a proper statement of the law. The issue raised by the defendants concerns whether the instruction should have been given, over defendants' objection, where defendants clearly indicated that they did not intend to argue entrapment.

Since, as we have indicated, the mere anticipation that an entrapment defense might be asserted was not a sufficient basis for the admission of evidence regarding the Hoppes transaction, it follows that Hoppes' testimony did not warrant the giving of an instruction on entrapment. Under these circumstances, it would have been a better practice to sustain defendants' objection to the giving of the instruction. We note, however, that the instruction given by the court did not advise the jury that the defendants admitted the acts alleged in the indictment, nor did it assert that the defendants were relying upon entrapment as their defense. The instruction merely informed the jury that, even if the government proved the conduct alleged in the indictment, defendants could nevertheless be acquitted if the jury should find that the defendants "had no previous intent or purpose to commit any offense of the character here charged, and did so only because [they were] induced or persuaded by some

law enforcement officer, . . .". Under these circumstances, any error in the giving of Instruction No. 25 must be considered harmless.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

INSTRUCTION NUMBER 20

Evidence of any other offense, if any, than the ones charged in the Indictment cannot be considered by you as any proof whatsoever of the guilt of the offenses with which the defendants are charged in the Indictment. Defendants are only on trial for the charged offenses in the Indictment before you in this case.

Before you consider the evidence of the purported cocaine narcotic drug transaction between the witnesses Mr. Hoppes and these defendants, Fred McCord and Kerry Luzader, which allegedly occurred between August 27, 1972, and September 8, 1972, in the City of Anderson, State of Indiana, as to a defendant, you must first find from all of the other evidence beyond a reasonable doubt that Fred McCord distributed the narcotic drug cocaine as charged in count one (1) of the Indictment and/or

used a public telephone in facilitating such distribution of such narcotic drug as charged in count three (3) of the Indictment, then, you the jury may consider such evidence of the witness', Hoppes, transaction that you find beyond a reasonable doubt to be a transaction of a like nature as those charged in the Indictment and as indicating an independent voluntary disposition during and prior to the transactions charged in the Indictment to violate the narcotic laws of the United States of America, in determining the state of mind or intent with which the defendant Fred McCord and/or the defendant Kerry Luzader did the acts respectively charged against them. And if you find beyond a reasonable doubt that all of the factual and legal elements of the transaction of the witness Hoppes with the defendant Fred McCord,

and/or the defendant Kerry Luzader, did occur and was of a like nature to that of the offenses charged against defendants in the Indictment in this case, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the Indictment the accused acted knowingly, wilfully, intentionally and unlawfully, and not because of mistake or accident or other innocent reason, or unlawfully entrapped or induced to commit a crime.

INSTRUCTION NUMBER 25

The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he should be acquitted by reason of being unlawfully entrapped, because the law as a matter of policy forbids a conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that law enforcement officers provide what appears to be a favorable opportunity, this is a lawful entrapment. When, for example, the officer has reasonable grounds for believing that a person is engaged in illicit sale of narcotics, it is not unlawful entrapment for the officer to pretend to be someone else and to offer, either

directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If then the jury should find from the evidence beyond a reasonable doubt that, before anything at all occurred respecting the alleged offenses involved in this case, the accused person was, and/or persons were, ready and willing to commit crimes such as those charged in the Indictment whenever opportunity was offered, and a law enforcement officer merely offered the opportunity, the accused person is, and/or persons are, not entitled to be acquitted by reason of the entrapment.

If, on the other hand, the jury should find or entertain a reasonable doubt that the accused person and/or persons had no previous intent or purpose to commit any offense of the character here charged, and

did so only because he was induced or persuaded by some law enforcement officer, then the prosecution has seduced an innocent person unlawfully and the jury should acquit such accused person and/or persons so unlawfully entrapped.

I have instructed you that an essential element and fact of the counts of the Indictment is that the defendant and/or defendants distributed the alleged narcotics, and/or used the telephone to facilitate such distribution knowingly, wilfully, and unlawfully and [while the defendants assert there was an unlawful entrapment *] -- correction -- and there is no burden on any of the defendants to prove anything including such [this language not read orally, and crossed out by Court during the reading] entrapment. The burden is on the United States of America to prove such

essential element and fact of the alleged knowledge, wilfullness, and unlawfulness as such cannot be true if there be an unlawful entrapment as distinguished from a lawful entrapment.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1975, two copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 24, 1975.

Before

Hon. WILBUR F. PELL, JR.
Circuit Judge

Hon. ROBERT A. SPRECHER
Circuit Judge

Hon. WILLIAM J. CAMPBELL
Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1879 & 73-1880 vs.

FRED McCORD and KERRY LUZADER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana
No. 72 CR 206
Cale J. Holder, Judge

*Senior Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

BEST COPY AVAILABLE

On consideration of the petition of defendants-appellants, Fred McCord and Kerry Luzader, for a rehearing by the court *en banc* in the above-entitled appeal, and, no member of the panel and no judge in regular service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of the defendants-appellants, for a rehearing *en banc* in the above-entitled appeal be, and the same is hereby denied.